

HONORABLE BENJAMIN H. SETTLE

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UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

T.K., individually, and as guardian for her  
daughter, G.G., a minor; B.G., individually; T.A.,  
individually, and as guardian for his daughter,  
A.A., a minor; J.A., individually, K.W.,  
individually, and as guardian for her daughter,  
P.W., a minor,

Plaintiffs,

vs.

FREDERICK DAVID STANLEY, individually,

Defendant.

Case No. 3:16-cv-05506-BHS

DEFENDANT'S MOTION TO  
DISMISS WITH PREJUDICE  
BASED UPON RES  
JUDICATA/CLAIM-SPLITTING

**Note on Motion Calendar:  
Friday, August 19, 2016**

**I. INTRODUCTION**

Plaintiffs T.K., individually and as guardian for her minor daughter G.G., B.G.,  
individually, T.A., individually and as guardian for his minor daughter A.A., J.A., individually  
and as guardian for her minor daughter P.W., previously brought suit in Thurston County  
Superior Court against Olympia School District (OSD) and various OSD  
employees/administrators, including Defendant Frederick David Stanley. The state court

1 action alleged harms arising out of the alleged sexual abuse of G.G., A.A. and P.W. by former  
2 OSD bus driver Gary Shafer.

3  
4 On July 8, 2016, Thurston County Superior Court Judge Anne Hirsch granted the  
5 defendants' motion for summary judgment and dismissed the claims of the minor plaintiffs.  
6 Plaintiffs herein are the same plaintiffs in the state court action. In this lawsuit, they are  
7 seeking damages against former OSD Transportation Director Fred Stanley for alleged harm  
8 caused by the alleged sexual abuse of the minor plaintiffs by Mr. Shafer. As is set forth herein,  
9 Plaintiffs' claims for damages in this lawsuit arising out of the alleged sexual abuse are barred  
10 by the doctrine of res judicata. The law simply does not allow Plaintiffs to "claim split" and  
11 now pursue a claim in this Court alleging damages based upon the same set of operative facts  
12 as the state court litigation that has been dismissed. Summary dismissal of Plaintiffs' claims  
13 with prejudice is therefore proper.  
14  
15

## 16 **II. FACTS/PROCEDURAL HISTORY**

17  
18 On April 9, 2014, Plaintiffs filed suit in Thurston County Superior Court against  
19 Olympia School District and several current and former employees/administrators (*Tiffany*  
20 *Kelso, et.al. v. Olympia School District, et. al.*, Thurston County Superior Court Cause No.14-  
21 2-00678-8). *See, Affidavit of Michael McFarland, Exhibit A.* On May 17, 2016, the defendants  
22 filed a motion for summary judgment. *Affidavit of Michael McFarland.* Defendants' motion  
23 was premised upon the argument that Plaintiffs could present no competent evidence that any  
24 of the minor plaintiffs had been sexually abused. *Id.* On July 8, 2016, Judge Ann Hirsch  
25 granted the defendants' motion. *Id.* On July 15, 2016, Judge Hirsch entered an order granting  
26 the defendants' motion for summary judgment and dismissing the "claims of minor Plaintiffs  
27 G.G., A.A., and P.W." *Affidavit of Michael McFarland, Exhibit B.*  
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29  
30

### III. LAW/ARGUMENT

Plaintiffs' Complaint in the state court action is attached as Exhibit A to the Affidavit of Michael McFarland. In that Complaint, Plaintiffs asserted four causes of action: (1) negligence; (2) gross negligence; (3) mandatory reporting failure under RCW 26.44.030; and (4) negligent infliction of emotional distress. *Affidavit of Michael McFarland, Exhibit A.* Those causes of action were premised upon the assertion that Mr. Shafer sexually abused minor plaintiffs G.G., A.A. and P.W. on an OSD bus. *Id.* The instant lawsuit is based upon the exact same facts and allegations as the state court action. The only difference between the state court action and the instant action is that Plaintiffs have asserted two causes of action (42 USC § 1983 and "Spoliation"<sup>1</sup>) in this lawsuit that were not asserted in the state court action. As set forth herein, that difference is immaterial and summary judgment based upon res judicata/claim splitting is proper.

#### A. Plaintiffs' Claims Are Barred By The Doctrine Of Res Judicata.

Res judicata is a doctrine of claim preclusion that bars relitigation of a claim that has been determined by a final judgment. *Storti v. Univ. of Wash.*, 181 Wash.2d 28, 40–41, 330 P.3d 159 (2014). Filing two separate lawsuits based on the same event is precluded under Washington law. *Ensley v. Pitcher*, 152 Wash.App. 891, 898-99, 222 P.3d 99 (2009), review denied, 168 Wash.2d 1028, 230 P.3d 1060 (2010). "Res judicata applies to matters that were actually litigated and those that 'could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding.'" *DeYoung v. Cenex Ltd.*, 100 Wash.App. 885, 891–92, 1 P.3d 587 (2000) (quoting *Kelly–Hansen v. Kelly–Hansen*, 87

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<sup>1</sup> As set forth below, the plaintiffs did in fact allege spoliation in the state court action. They just did not identify it as a separate cause of action.

1 Wash.App. 320, 328–29, 941 P.2d 1108 (1997)), *review denied*, 146 Wn.2d 1016 (2002). Res  
 2 judicata is intended to prevent piecemeal litigation and to ensure the finality of judgments.  
 3  
 4 *Spokane Research & Defense Fund v. City of Spokane*, 155 Wash.2d 89, 99, 117 P.3d 1117  
 5 (2005). The doctrine of res judicata promotes judicial economy, efficiency, and fairness to  
 6 litigants. *Storti*, 181 Wash.2d at 40.

7  
 8 ““The doctrine of *res judicata* rests upon the ground that a matter which has been  
 9 litigated, or on which there has been an opportunity to litigate, in a former action in a court of  
 10 competent jurisdiction, should not be permitted to be litigated again. It puts an end to strife,  
 11 produces certainty as to individual rights, and gives dignity and respect to judicial  
 12 proceedings.”” *Marino Prop. Co. v. Port Comm'rs*, 97 Wash.2d 307, 312, 644 P.2d 1181  
 13 (1982) (quoting *Walsh v. Wolff*, 32 Wash.2d 285, 287, 201 P.2d 215 (1949)). “Filing two  
 14 separate lawsuits based on the same event—claim splitting—is precluded in Washington.”  
 15  
 16 *Ensley v. Pitcher*, 152 Wash. App. at 898-99.

17  
 18 “The court looks to the law of the forum state—here Washington—to determine the  
 19 preclusive effect of a state court judgment.” *Zweber v. State Farm Mut. Auto. Ins. Co.*, 39 F.  
 20 Supp. 3d 1161, 1165-66 (W.D. Wash. 2014), *citing* *Smith v. State Farm Mut. Auto. Ins. Co.*,  
 21 2013 WL 1499265, at 4 n. 1 (W.D.Wash. April 11, 2013) (citing *Manufactured Home Cmty's*  
 22 *Inc. v. City of San Jose*, 420 F.3d 1022, 1031 (9th Cir.2005)).

23  
 24 “Under Washington law, the doctrine of res judicata precludes so-called iclaim  
 25 splitting.”” *Zweber* 39 F. Supp. 3d 1161, *citing* *Ensley v. Pitcher*, *supra*. “Claim splitting  
 26 occurs when a party files two separate lawsuits based on the same events.” *Id.* “The judicially  
 27 created doctrine of res judicata rests upon the ground that a matter [that] has been litigated, or  
 28 on which there has been an opportunity to litigate, in a former action in a court of competent  
 29  
 30

jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings.” *Smith*, 2013 WL 1499265, at 4 (quoting *Ensley*, 222 P.3d at 102) (quotation marks omitted). “Washington courts have explained that the ‘general rule’ is that if an action is brought for part of a claim, it must be brought for the whole claim, and a judgment obtained in the first action precludes the plaintiff from bringing successive actions for ‘the residue of the claim.’” *Id.* (quoting *Karlberg v. Otten*, 167 Wash.App. 522, 280 P.3d 1123, 1130 (2012)). “Thus, all issues [that] might have been raised and determined are precluded.” *Id.* (quoting *Feminist Women's Health Ctr. v. Codispoti*, 63 F.3d 863, 868 (9th Cir.1995)). “In Washington, res judicata is ‘the rule, not the exception.’” *Id.*, citing *Hisle v. Todd Pac. 1166 Shipyards Corp.*, 151 Wash.2d 853, 93 P.3d 108 (2004).

To determine whether res judicata applies, Washington courts apply a four-part test. *Karlberg*, 280 P.3d at 1130. In all instances, res judicata applies only if there is a final judgment on the merits. *Id.* (citing *Pederson v. Potter*, 103 Wash.App. 62, 11 P.3d 833, 835 (2000)). Assuming there is, that judgment will have preclusive effect if there is identity between the prior judgment and the subsequent action with respect to (1) persons and parties; (2) causes of action; (3) subject matter; and (4) the quality of persons for or against whom the claim was made. *Id.* Washington courts have applied these four factors in “a variety of ways,” and “it is not necessary that all four factors favor preclusion to bar the claim.” *Smith*, 2013 WL 1499265, at 4 (citing *Codispoti*, 63 F.3d at 868). Here, all four elements are met.

### **1. There Is Identity Of Parties.**

The state court action was brought by “Tiffany Kelso, individually, and as guardian for her daughter, G.G., a minor, Bronson Gouveia, individually; Todd Adams, individually, and as

guardian for his daughter, A.A., a minor, Jennifer Adams, individually; Kristen Westlund, individually, and as guardian for her daughter, P.W., a minor.” *Affidavit of Michael McFarland, Exhibit A*. The plaintiffs in this suit are “T.K., individually, and as guardian for her daughter, G.G., a minor, B.G., individually; T.A., individually, and as guardian for his daughter, A.A., a minor, J.A., individually; K.W., individually, and as guardian for her daughter, P.W., a minor.” *ECF 1, pg. 1*. The plaintiffs in the two suits are identical.

Frederick Stanley was a defendant in the state court action and is named as a defendant herein. The defendants are identical. Defendant Fred Stanley was the “District’s former Transportation Director.” *ECF 1, pg. 6, Par. 19*. There is identity of parties.

## **2. There Is Identity Of Subject Matter.**

Even a cursory review of the two complaints establishes the identity of the subject matter in the two lawsuits. In both cases, the “subject matter” is the alleged failure of OSD and its administrators, including Mr. Stanley, to protect the minor plaintiffs from the alleged abuse by Mr. Shafer. Regardless of the causes of action asserted (see below), it cannot be logically denied by Plaintiffs that the subject matter of both suits is identical. As set forth below, the Complaint in this matter is nearly identical to the one filed in Thurston County Superior Court, with many paragraphs being repeated word for word. Sometimes the paragraphs have been altered slightly and in some instances additional factual information is included. However, both lawsuits seek damages based upon the identical premise: That the alleged actions and inactions of Mr. Stanley gave Mr. Shafer access to the minor plaintiffs, and that with that access, Mr. Shafer sexually abused the plaintiffs.

Mr. Stanley will not identify herein every single factual assertion that is identical in the two complaints. However, for ease of the Court’s reference, Mr. Stanley provides the

1 following chart, which compares many of the allegations made in the state court action with  
 2 the corresponding allegations from the Complaint in this matter. As noted, some paragraphs  
 3 are identical, while others have been modified slightly to add additional factual background.  
 4 The bottom line, however, is that the subject matter of both lawsuits is the alleged sexual  
 5 abuse allegedly perpetrated by Mr. Shafer on the minor plaintiffs, which Plaintiffs allege is the  
 6 result of the actions and inactions of Mr. Stanley.  
 7  
 8

<b>Complaint in <i>Kelso. v. Olympia School District</i>, Thurston County Superior Court Cause No.14-2-00678-8</b>	<b>Complaint in <i>T.K. v. Olympia School District</i>, Western District of Washington, 3:16-cv-05506-BHS</b>
Within days of learning that Shafer had been arrested, Stephen Kern, an Olympia School District bus driver and friend of Gary Shafer, reported to his two bosses that he felt concerned Shafer may have molested kindergarten student P.W. while Shafer rode along on multiple occasions in the midday kindergarten bus Mr. Kern drove. <b>Paragraph 1.2</b>	Within days of learning that Shafer had been arrested, Stephen Kern, an Olympia School District bus driver and friend of Gary Shafer, reported to Fred Stanley and his training director, Barbra Greer, that he felt concerned Shafer may have molested kindergarten student P.W. while Shafer rode along on multiple occasions in the midday kindergarten bus Mr. Kern drove. <b>Paragraph 9</b>
To summarize the testimony above, Stephen Kern originally was told by his district superiors that they would follow up on his report about potential abuse of P.W. Two weeks went by and Stephen Kern heard nothing from his supervisors. He was concerned that the child had been molested. He wanted to learn about her welfare. He returned to confront training director Barbara Greer about the report he made concerning P.W. Greer told Stephen Kern that the child and her family had left the school and there was nothing that could be done. P.W. and her family never left the Olympia School District. She continuously remained a student in the same school throughout elementary school.	Stephen Kern originally was told by his district superiors that they would follow up on his report about potential abuse of P.W. Two weeks went by and Stephen Kern heard nothing from his supervisors. He was concerned that the child had been molested. He wanted to learn about her welfare. He returned to confront training director Barbara Greer about the report he made concerning P.W. Greer told Stephen Kern that the child and her family had left the school and there was nothing that could be done. P.W. and her family never left the Olympia School District. She continuously remained a student in the same school throughout elementary school. <b>Paragraph 9</b>



**Paragraph 1.3**

The story begins with what the District knew or should have known about Gary Shafer. The District hired Shafer as bus driver in 2005. During his interview, he said that he would make a good bus driver because he "love[d] of children" and because he "like[s] being around kids." His goal was to "get to know the kids." When asked whether he was prepared to accept the responsibility for the lives of the students on the bus, he said, "yes, kind of scary." **Paragraph 4.2**

During his interview, he said that he would make a good bus driver because he "love[s] [] children" and because he "like[s] being around kids." His goal was to "get to know the kids." When asked whether he was prepared to accept the responsibility for the lives of the students on the bus, he said, "yes, kind of scary." **Paragraph 22**

Beginning right away, Shafer started asking Transportation Director Fred Stanley whether he could spend all of his free time riding along with other drivers on their midday kindergarten and special needs routes because he liked being around the kids so much. Stanley gave Shafer blanket permission to ride along, later claiming that he never had reason to distrust Shafer's motivations for wanting to ride along with the vulnerable children. Stanley never assigned Shafer to these rides, never checked on what he was doing on these rides, never kept track of how often or with whom he was riding, and never spoke to any driver about what Shafer was doing during these ride alongs. Furthermore, the District never paid Shafer for the ride alongs or for helping to manage the kindergarten and special needs passengers; instead, the District allowed Shafer to do it because they never created a policy prohibiting it.

**Paragraph 4.3**

Beginning right away, Shafer asked Defendant Stanley whether he could volunteer to ride along with other drivers on their midday kindergarten, pre-kindergarten, and special needs routes because he liked being around the kids so much, especially the District's most vulnerable. Stanley gave Shafer permission to ride along, and then by permission and acquiescing, gave Shafer complete authorization for his ride alongs, later claiming that he never had reason to distrust Shafer's motivations for wanting to ride along with the vulnerable children. Under Stanley's blanket permission, Shafer was able to ride along on hundreds of school buses whenever and wherever he wanted. Stanley never assigned Shafer to these rides, never checked on what he was doing on these rides, never kept track of how often or with whom he was riding, and never spoke to any driver about what Shafer was doing during these ride alongs. Furthermore, Shafer was never paid for his hundreds of ride alongs or for helping to manage the kindergarten, pre-kindergarten, and special needs passengers; instead, the Stanley allowed Shafer to do it because he was deliberately indifferent to the danger he



	created in doing. <b>Paragraph 23</b>
<p>In an effort to coordinate his access to young girls, Shafer would use the ride alongs to identify kindergarten girl targets on the buses, switching his assigned bus route at least 18 known times to isolate certain girls. Shafer would pull the bus over or arrive at stops early so that he would have down time with the girls. He also took full advantage of Defendant Stanley's "open door" ride along policy to access the young girls on other drivers' kindergarten, pre-kindergarten, and special needs routes. <b>Paragraph 4.4</b></p>	<p>In an effort to coordinate his access to young girls, Shafer used several tactics. He would use the ride alongs to identify his targets among the kindergarten, pre-route or keep riding along with his victims on buses being driven by other drivers who would allow him as an unauthorized guest. Shafer frequently and often abruptly changed his driving assignments, either looking for victims or escaping potential problems he created by molesting children on his buses. . . . He took full advantage of Defendant Stanley's "open door" ride along policy that directly created the danger of allowing him to access the young girls on other drivers' kindergarten, prekindergarten, and special needs routes. <b>Paragraph 27</b></p>
<p>In the fall of 2006, Shafer went on "sub status" as a bus driver with the District because he left for a higher-paying job as a long haul trucker. As he told many bus drivers, he was having financial problems and needed more money. Even though he successfully completed the trucking program at the top of his class, Shafer left the trucking work immediately and returned to the bus barn to work part-time for the District. In Shafer's own words, "I was going to be doing long haul truck driving starting last winter but I decided not to for various reasons even though it would have been a lot of money." <b>Paragraph 4.5</b></p>	<p>Shafer had been driving his assigned route when, in November 2006, he suddenly put in for a route change and then announced that he would be leaving for a higher-paying job as a long-haul trucker. He told many bus drivers that he was having financial problems and needed more money. The reality was that he abruptly changed from a special needs bus route because over concerns over getting caught for sexual abuse. Even though he successfully completed the trucking program at the top of his class, Shafer left the trucking work immediately and returned to the bus barn to work part-time for the District. In Shafer's own words, "I was going to be doing long haul truck driving starting last winter but I decided not to for various reasons even though it would have been a lot of money." <b>Paragraph 28</b></p>

When confronted by a fellow bus driver about why he left his long haul trucking job despite his money woes, Shafer told his co-workers that he returned as a part-time school bus driver because he missed contact with children. From this incident and others, Shafer's fellow bus drivers found him very strange and unusually interested in children. He was being described as "odd" by at least one school counselor and was reportedly observed viewing child pornography on a bus barn computer by a fellow driver. Shafer has also admitted and has been seen by other bus drivers pulling his bus over to the side of the road or in parking lots for no apparent reason. **Paragraph 4.6**

When confronted by a fellow bus driver about why he left his long haul trucking job despite his money woes, Shafer told his co-workers that he returned as a part-time school bus driver because he missed contact with children. From this incident and others, Shafer's fellow bus drivers found him very strange and unusually interested in children. He was being described as "odd" by at least one school counselor and was reportedly observed viewing child pornography on a bus barn computer by a fellow driver. Shafer has also admitted and has been seen by other bus drivers pulling his bus over to the side of the road or in parking lots for no apparent reason. At least one driver raised concerns with the administrative office about Shafer being parked for no apparent reason during a route. Even Defendant Stanley himself has admitted that he confronted Shafer about pulling over his buses for no reason. **Paragraph 29**

In the fall of 2009, McLane Elementary School bus driver Karen Nelson became ill and the District used sub drivers to cover the route. Shafer began targeting kindergarten girls for abuse on the route by riding along with various sub drivers. He also drove the bus as a substitute bus driver. On one occasion that he was driving, Shafer dropped off a young girl who as so shaken by the experience that she told her dad, Kevin Gearheart, that she never wanted to ride the bus again. **Paragraph 4.7**

In the fall of 2009, McLane Elementary School bus driver Karen Nelson became ill and the District used sub drivers to cover the route. Shafer began targeting kindergarten girls for abuse on the route by riding along with various sub drivers. He also drove the bus as a substitute bus driver. On one occasion that he was driving, Shafer dropped off a young girl who as so shaken by the experience that she told her dad, Kevin Gearheart, that she never wanted to ride the bus again. **Paragraph 31**

Mr. Gearheart called the District Transportation Department about concerns that a male substitute driver was dropping his kindergarten daughter off alone, a half-hour late, and so traumatized that she refused to ride the bus any longer. Despite the

Mr. Gearheart called the District Transportation Department about concerns that a male substitute driver was dropping his kindergarten daughter off alone, a half-hour late, and so traumatized that she refused to ride the bus any longer. Despite the father's

1 father's deep concerns and repeated calls, the  
 2 District downplayed any potential for  
 3 wrongdoing and performed no investigation;  
 4 it simply reiterated that all bus drivers  
 5 receive background checks, and therefore,  
 6 there was no need to do anything further.  
 7 Tragically, after Shafer's molestation  
 8 surfaced in 2011, Mr. Gearheart immediately  
 9 recognized Shafer's face as the driver who  
 10 had left his daughter traumatized from the  
 11 bus. He confronted the District about  
 Shafer's presence on the bus, but the District  
 lied and said that Shafer never drove that  
 bus. **Paragraph 4.8**

12 District employees discussed these "red  
 13 flags" but nothing was done to monitor or  
 14 investigate Shafer. By disregarding Shafer's  
 15 obsessive fixation on routes for kindergarten  
 16 children and other vulnerable students, the  
 17 District failed to ensure that Shafer was  
 acting appropriately and that children were  
 safe in his presence.

**Paragraph 4.9**

23 In late December 2010, the Thurston County  
 24 Sheriff's Department received a report that  
 25 Olympia School District bus driver Gary D.  
 26 Shafer sexually assaulted a kindergarten girl  
 27 on a bus driven by fellow bus driver Mario  
 28 Paz. Shafer was riding along with Paz to  
 "learn the route" and had the kindergarten  
 girl in his lap while seated behind the driver.

**Paragraph 4.11**

deep concerns and repeated calls, the District  
 downplayed any potential for wrongdoing and  
 performed no investigation; it simply  
 reiterated that all bus drivers receive  
 background checks, and therefore, there was  
 no need to do anything further. Tragically,  
 after Shafer's molestation surfaced in 2011,  
 Mr. Gearheart immediately recognized  
 Shafer's face as the driver who had left his  
 daughter traumatized from the bus. He  
 confronted the District about Shafer's  
 presence on the bus, but the District lied and  
 said that Shafer never drove that bus.

**Paragraph 32**

District employees discussed these "red flags"  
 but nothing was done to monitor or  
 investigate Shafer. By ignoring evidence that  
 Shafer was acting inappropriately, including  
 actual reports that Shafer was inappropriately  
 touching and otherwise engaging in peer-to-  
 peer activities with children on the school  
 bus, commonly known as sexual grooming, as  
 well as ignoring evidence of Shafer's  
 obsessive fixation on routes for kindergarten,  
 pre-kindergarten, and special needs children,  
 the District acted with deliberate indifference  
 toward the safety of children in its custody  
 and control, including Plaintiffs G.G., A.A.,  
 and P.W. **Paragraph 33**

In late December 2010, the Thurston County  
 Sheriffs Department received a report that  
 Olympia School District bus driver Gary D.  
 Shafer sexually assaulted a kindergarten girl  
 named N.L. on a bus driven by fellow bus  
 driver Mario Paz. Shafer was riding along  
 with Paz to "learn the route" and had the  
 kindergarten girl in his lap while seated  
 behind the driver. Shafer sexually abused  
 N.L. while she was in his lap, and N.L.

1		disclosed the abuse to her mother, who in turn
2		contacted the District. <b>Paragraph 34</b>
3	Shafer admitted to pulling his own buses to	Shafer admitted to pulling his own buses to
4	the side of the road to molest young girls on	the side of the road to molest young girls on
5	his bus; Shafer admitted to detaining young	his bus; Shafer admitted to detaining young
6	girls in his bus after arriving to destinations	girls in his bus after arriving to destinations
7	early; Shafer admitted to accessing	early; Shafer admitted to accessing
8	pornography on the District bus barn's	pornography on the District bus barn's
9	computers on a regular basis without the	computers on a regular basis without the
10	District ever tracking, logging, or	District ever tracking, logging, or confronting
11	confronting him about it; Shafer admitted to	him about it; Shafer admitted to masturbating
12	masturbating in the bus barn and on the	in the bus barn and on the busses; and finally,
13	busses; and finally, Shafer admitted to	Shafer admitted to photographing,
14	photographing, videotaping, and sexually	videotaping, and sexually assaulting up to 30
15	assaulting up to 30 young District students	young District students while working in his
16	while working in his capacity as an Olympia	capacity as an Olympia School District bus
17	School District bus driver. <b>Paragraph 4.12</b>	driver. <b>Paragraph 35</b>
18	On May 5, 2011, Thurston County Sheriff's	On May 5, 2011, Thurston County Sheriffs
19	Office interviewed Gary Shafer after	Office interviewed Gary Shafer after
20	receiving information that he had sexually	receiving information that he had sexually
21	assaulted a young girl at Garfield	assaulted a young girl at Garfield Elementary
22	Elementary School who was approximately	School who was approximately 5 or 6 years
23	5 or 6 years old. This was G.G.'s friend T.C.	old. This was G.G.'s friend T.C.
24	<b>Paragraph 4.13</b>	<b>Paragraph 36</b>
25	T.C.'s mother reported to Garfield	T.C.'s mother reported to Garfield Elementary
26	Elementary School's Principal Bob Hodges	School's Principal Bob Hodges that her
27	that her daughter disclosed that G.G. was	daughter disclosed that G.G. was also a victim
28	also a victim of Gary Shafer. Bob Hodges	of Gary Shafer. Bob Hodges advised T.C.'s
29	advised T.C.'s mother that he would "take it	mother that he would "take it from here."
30	from here." Nothing was ever reported to	Nothing was ever reported to authorities
	authorities about these concerns.	about these concerns. Nothing was done by
	<b>Paragraph 4.14</b>	Stanley to collect or preserve evidence.
		<b>Paragraph 36</b>
	The District's Transportation Director, Fred	Stanley has repeatedly testified that he had
	Stanley, recently claimed that "[t]here's no	"no reason to be looking" at what Shafer was
	reason for a bus driver not to sit with	doing because he "trusted" all of his drivers
	children. . . . We hire good people and	for having passed a background check.
	everybody has been background checked	<b>Paragraph 26</b>
	and we have no reason not to trust our	

1	employees." <b>Paragraph 4.15</b>	
2	District failed to properly train its employees	Defendant Stanley failed to properly train his
3	on how to recognize obvious signs that	employees on how to recognize obvious signs
4	Shafer was using school buses to molest	that Shafer was using school buses to molest
5	young vulnerable girls. <b>Paragraph 4.18</b>	young vulnerable girls. <b>Paragraph 41</b>
6	The District brushed aside the importance of	Defendant Stanley brushed aside the
7	training school employees on understanding	importance of training school employees on
8	that a molester's best camouflage is our	understanding that a molester's best
9	unwillingness to see him. According to	camouflage is a school district's unwillingness
10	leading commentators, accepting that	to see him This is particularly alarming in
11	molesters may lurk in our midst is crucial to	light of the research of leading commentators,
12	preventing child abuse:	who teach that accepting that molesters may
13	Many educators do not believe that a	lurk in our midst is crucial to preventing child
14	colleague could sexually exploit a	abuse:
15	student. They believe that if such abuse	Many educators do not believe that a
16	happens, it happens in some other	colleague could sexually exploit a student.
17	community and it is so rare and	They believe that if such abuse happens, it
18	idiosyncratic that it does not warrant	happens in some other community and it is
19	attention. Many believe that educators	so rare and idiosyncratic that it does not
20	already know they should not have	warrant attention. Many believe that
21	sexual relationships with students.	educators already know they should not
22	Consequently, some are insulted when	have sexual relationships with students.
23	they are required to attend training on	Consequently, some are insulted when they
24	this issue. Unfortunately, it is just such	are required to attend training on this issue.
25	attitudes that have created the	Unfortunately, it is just such attitudes that
26	educational climate that allows sexual	have created the educational climate that
27	abuse to continue.	allows sexual abuse to continue.
28	Shoop at 63. By failing to properly train	Shoop at 63. By failing to properly train
29	employees, the District created a climate that	employees, the District and the individually
30	allowed Shafer's sexual abuse to continue.	named defendants herein who were
	<b>Paragraph 4.18</b>	responsible for training drivers created a
		climate that allowed Shafer's sexual abuse to
		continue. <b>Paragraph 42</b>
	When the factual verifications of Shafer's	When the factual verifications of Shafer's
	molestations began circulating,	molestations began circulating, and people
	Transportation Department Director Fred	began to push for answers as to how it all
	Stanley refused to entertain the possibility	happened, Defendant Stanley refused to
	that Shafer would have molested the children	entertain the possibility that Shafer would
	and sent a chilling threat to the bus drivers:	have molested the children and sent a chilling

1 These rumors [about Shafer] are  
 2 slanderous and the people spreading  
 3 them could and I feel should be charged  
 4 with a crime and prosecuted to the fullest  
 5 extent of the law. If you are one of those  
 6 spreading this information and I hear it, I  
 7 will report it to the proper authorities and  
 8 I want to encourage those that have told  
 me they are highly offended by this kind  
 of behavior to do the same. **Paragraph**  
**4.19**

threat to the bus drivers:

These rumors [about Shafer] are  
 slanderous and the people spreading them  
 could and I feel should be charged with a  
 crime and prosecuted to the fullest extent  
 of the law. If you are one of those  
 spreading this information and I hear it, I  
 will report it to the proper authorities and I  
 want to encourage those that have told me  
 they are highly offended by this kind of  
 behavior to do the same. **Paragraph 40**

9 The District's employees did not receive  
 10 crucial training on how to spot molesters.  
 11 District administrators received "boundary  
 12 invasion" training in the spring of 2010,  
 13 which taught about the significant danger of  
 14 school personnel molesting children and  
 15 included statistics about the specific danger  
 16 presented by bus drivers. Despite the  
 17 considerable value in this training, District  
 18 officials became deeply offended by the  
 19 notion that District might include child  
 20 predators. District officials thought that the  
 presentation was "negative" and refused to  
 train District employees on the subject of  
 boundary invasions. **Paragraph 4.20**

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 crucial training on how to spot molesters.  
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 considerable value in this training, as former  
 superintendent William Lahmann  
 acknowledged, District officials became  
 deeply offended by the notion that District  
 might include child predators. District  
 officials thought that the presentation was  
 "negative" and refused to train District  
 employees on the subject of boundary  
 invasions. **Paragraph 44**

22 Even since Shafer's pandemic molestation  
 23 surfaced, the District disregarded and  
 24 disputed many of the facts that should have  
 25 prompted full internal investigations and  
 26 reports. A large discrepancy, for example,  
 27 exists between Mario Paz's and Shafer's  
 28 recollection of how many times Shafer  
 29 would ride Paz's bus to "learn the route." Paz  
 30 has repeatedly asserted that Shafer only rode  
 his bus three times, even though Shafer told  
 investigators that he was on the bus

The Olympia School District and its bus  
 driver, Mario Paz, claimed over the next two  
 years that Gary Shafer had ridden along as an  
 unauthorized passenger on only "two or three  
 occasions." When confronted under oath in  
 prison, Shafer revealed he actually rode the  
 bus driven by Mario Paz upwards of 20 times.  
**Paragraph 38**



throughout the fall and early winter of 2010. Recently, Shafer stated that he rode on Paz's bus regularly from October 2010 through December 2010. **Paragraph 4.21**

Despite clear evidence of significant sexual abuse by Shafer, the District has made absolutely no effort to locate and identify 30 or more other children who were sexually abused on its school buses. **Paragraph 4.22**

Bus driver Stephen Kern testified in 2013 that he observed Gary Shafer sitting next to P.W. on multiple bus rides during occasions where Shafer volunteered to ride along on Mr. Kern's bus. Mr. Kern knew that Shafer's presence next to P.W. on the seat was altering her behavior from extremely outgoing to unusually quiet. When Mr. Kern learned that Shafer was reported to have molested other kindergarten girls on buses, Mr. Kern immediately alerted bus administrators that he was concerned Shafer had molested P.W. No administrator ever reported this concern. A few weeks after Mr. Kern first reported his concern that Shafer may have abused P.W., he followed up with administrators, but was told that P.W. had moved out of the District and that there was nothing they could do to get in contact with her parents to inform them of Mr. Kern's concern. This was a false statement and a knowing cover-up of a potential child sexual abuse incident. The family did not move out of the District and P.W. attended Garfield Elementary School continuously since kindergarten. **Paragraph 4.24**

Despite clear evidence of significant sexual abuse by Shafer, the District and its agents, including Defendant Stanley, has made little effort to locate and identify 30 or more other children who were sexually abused on its school buses. **Paragraph 45**

Bus driver Stephen Kern testified in 2013 that he observed Gary Shafer sitting next to P.W. on multiple bus rides during occasions where Shafer volunteered to ride along on Mr. Kern's bus. Mr. Kern knew that Shafer's presence next to P.W. on the seat was altering her behavior from extremely outgoing to unusually quiet. When Mr. Kern learned that Shafer was reported to have molested other kindergarten girls on buses, Mr. Kern immediately alerted Defendant Stanley and Geer that he was concerned Shafer had molested P.W. Stanley failed to report this concern. A few weeks after Mr. Kern first reported his concern that Shafer may have abused P.W., he followed up with administrators, but was told that P.W. had moved out of the District and that there was nothing they could do to get in contact with her parents to inform them of Mr. Kern's concern. This was a false statement and a knowing cover-up of a potential child sexual abuse incident. The family did not move out of the District and P.W. attended Garfield Elementary School continuously since kindergarten. **Paragraph 37**



Causes of action are identical for res judicata if (1) prosecution of the later action would impair the rights established in the earlier action, (2) the evidence in both actions is substantially the same, (3) infringement of the same right is alleged in both actions, and (4) the actions arise out of the same nucleus of facts. *Spokane Cty. v. Miotke*, 158 Wash. App. 62, 67, 240 P.3d 811 (2010). Here, Plaintiffs' claims for damages arising from the alleged sexual abuse of the minor plaintiffs by Mr. Shafer were dismissed by the Thurston County Superior Court. Prosecuting this lawsuit would impair the rights established in the state court action. In addition, the evidence in both actions is not just "substantially the same," it is identical. While Plaintiffs have a different, and higher, burden of proof to establish their federal cause of action, the evidence upon which they would rely to attempt to establish liability is identical to the evidence in the Thurston County case. The two lawsuits arise out of the exact same nucleus of facts and involve the identical alleged infringement of the same right (the alleged sexual abuse of the minor plaintiffs). The subject matter of the two lawsuits is identical. Plaintiffs will not identify any differences in the subject matter of the two suits.

### **3. There is Identity Of Causes Of Action.**

It is anticipated that Plaintiffs will argue that res judicata is inapplicable because the causes of action in the two suits are different. Such an argument is unpersuasive, as case law makes it clear that Plaintiffs are precluded from pursuing any claim they could have brought in the state court action. Res judicata refers to "the preclusive effect of judgments, including the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action." *Loveridge v. Fred Meyer, Inc.*, 125 Wash. 2d 759, 763, 887 P.2d 898 (1995).

Claim-splitting is prohibited by the doctrine of res judicata, which bars parties to a prior action or those in privity with them from raising in a subsequent proceeding any claim they could have

1 raised in the prior one, where all the claims arise from a common  
2 nucleus of operative facts.

3 *O'Dell v. Conseco Senior Health Ins. Co.*, No. C08-00793 RSL, 2011 WL 13044240, at 4  
4 (W.D. Wash. Feb. 10, 2011), *citing Adams v. Cal. Dep't of Health Servs.*, 487 F.3d 684, 689  
5 (9th Cir.2007); *Enslev v. Pitcher*, *supra*.  
6

7 *Res judicata* estops parties from relitigating claims under a  
8 different legal theory and subsequently filing suit. All issues that  
9 could have been raised in a prior suit are precluded, even if the  
10 claims were not actually litigated. As such, *res judicata* prevents  
11 claim-splitting; a plaintiff may not file a lawsuit under a new legal  
theory seeking new legal remedies for a claim that could have  
been raised in a prior action.

12 *Peterson v. sanofi-aventis U.S. LLC*, No. CV-12-202-LRS, 2012 WL 2880883, at 2 (E.D.  
13 Wash. July 13, 2012)  
14

15 In *Hyytinen v. Morhous*, No. C14-5537 BHS, 2015 WL 917621 (W.D. Wash. Mar. 3,  
16 2015), the Court noted: “The general rule is that if an action is brought for part of a claim, a  
17 judgment obtained in the action precludes the plaintiff from bringing a second action for the  
18 residue of the claim. Thus, ‘all issues which might have been raised and determined are  
19 precluded.’” *Hyytinen v. Morhous*, at 4, *citing Karlberg v. Otten*, 167 Wash.App. 522, 535,  
20 280 P.3d 1123 (2012) and *Shoemaker v. City of Bremerton*, 109 Wash.2d 504, 507, 745 P.2d  
21 858 (1987). In *Hyytinen v. Morhous*, the plaintiff (Hyytinen) filed suit in state court (Kitsap  
22 County Superior Court) against the Washington State Patrol and the City of Bremerton,  
23 alleging that the WSP violated his federal due process rights and acted negligently when it  
24 seized his vehicle. The trial court dismissed Hyytinen’s claims against WSP. After an  
25 unsuccessful appeal, Hyytinen filed suit in federal court against the Washington State Patrol  
26 trooper (Morhous) involved in the seizure of the vehicle, alleging a violation of 42 U.S.C. §  
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1 1983. In granting summary judgment, the Court noted that “section 1983 does not override  
 2 state preclusion law.” *Hyytinen v. Morhous*, at 3, citing *Migra v. Warren City Sch. Dist. Bd. of*  
 3 *Educ.*, 465 U.S. 75, 85, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984). The Court therefore concluded  
 4 that the causes of action are “identical.” *Id.*

6 In the instant case, Plaintiffs can offer no reason why the 42 U.S.C. § 1983 and  
 7 “spoliation” claims could not have been brought as part of the state court litigation.<sup>2</sup> Case law  
 8 precludes Plaintiffs’ attempt to split their claims. “Filing two separate lawsuits based on the  
 9 same event—claim splitting—is precluded in Washington.” *Landry v. Luscher*, 95 Wash.App.  
 10 779, 780, 976 P.2d 1274 (1999).

11  
 12  
 13 **4. There Is Identity In Quality Of The Persons For Or Against Whom The**  
 14 **Claim Is Made.**

15 The relationship between Plaintiffs and Mr. Stanley was and is adversarial in both  
 16 proceedings. This satisfies this element of res judicata. *See, Landry v. Luscher*, 95 Wash. App.  
 17 779, 785, 976 P.2d 1274 (1999), citing *Bordeaux v. Ingersoll Rand Co.*, 71 Wash.2d 392, 397-  
 18 98, 429 P.2d 207 (1967) (“Again the Luschers were identified as the defendants and the  
 19 Landrys were identified as the plaintiffs in both actions. The relationship between the  
 20 Luschers and the Landrys was adversarial in both proceedings. These actions met the  
 21 requirements of res judicata”).  
 22  
 23

24 \*\*\*

25 Plaintiffs have had their day in court as it relates to the alleged harm to the minor  
 26 plaintiffs arising from the alleged sexual abuse by Mr. Shafer. They presented evidence to  
 27

28  
 29 <sup>2</sup> Technically, Plaintiffs’ state court claim of “Mandatory Reporting Failure Under RCW 26.44.030  
 30 is a claim for “spoliation.” In fact, Plaintiffs specifically alleged that the claimed “failure to report”  
 “resulted in a spoliation of the evidence.” Affidavit of Michael McFarland, Exhibit A, pg. 18, line 5.

Judge Hirsch in opposition to the defendants' motion for summary judgment. Judge Hirsch rejected that evidence and dismissed the minors' claims for damages arising out of the alleged sexual abuse. The law precludes a plaintiff dissatisfied with the results of litigation to simply pursue the litigation in a different court by simply asserting different causes of action. This is a classic case of prohibited "claim splitting." The Court should reject Plaintiffs' efforts to get the proverbial two bites at the apple and should dismiss this litigation.

**B. Defendants Should Be Awarded Their Attorneys Fees And Costs.**

Under RCW 4.84.185, the Court may award attorney's fees upon a finding that the lawsuit was "frivolous and advanced without reasonable cause...." RCW 4.84.185. "A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts." *Tiger Oil Corp. v. Dep't of Licensing*, 88 Wash.App. 925, 938, 946 P.2d 1235 (1997). Having lost in state court based upon the identical facts, Plaintiffs' lawsuit in this Court is frivolous. *Hyytinen v. Morhous*, 2015 WL 917621, at 5 (W.D. Wash. Mar. 3, 2015) ("Here, the Court finds that Hyytinen's claims against Morhous are frivolous and advanced without reasonable cause. Hyytinen filed two separate lawsuits based on the same events. As discussed above, the doctrine of res judicata precludes such claim splitting").

**IV. CONCLUSION**

The law prohibits claim splitting. Plaintiffs have already unsuccessfully litigated their claims against Mr. Stanley. They are not entitled to seek herein what the Thurston County Superior Court has already rejected. The Court should therefore grant Mr. Stanley's motion and dismiss Plaintiffs' claims with prejudice. The Court should also award Mr. Stanley his costs and fees incurred in bringing this motion.

1 DATED this 25<sup>th</sup> day of July, 2016.

2 EVANS, CRAVEN & LACKIE, P.S.

3  
4 By: s/ Michael E. McFarland, Jr.  
5 Michael E. McFarland, Jr., #23000  
6 Attorneys for Defendant  
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**CERTIFICATE OF SERVICE**

I hereby certify that on July 25, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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